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14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE DISTRICT OF ARIZONA

17 United States of America,
18
19 Plaintiff,
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21 v.
22 James W. Clark,
23
24 Defendant.

No. CR-22-00889-01-PHX-MTL

**GOVERNMENT'S RESPONSE
TO DEFENDANT'S OBJECTIONS**

23 **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S**
24 **OBJECTIONS TO DRAFT PRESENTENCE REPORT**

25 The United States submits this response to Defendant James W. Clark's Objections
26 to the Draft Presentence Report ("Obj."), ECF No. 58. The Draft Presentence Report
27 ("Draft PSR"), ECF No. 53, contains the correct calculation for Defendant's Guidelines
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1 range. The enhancements at U.S.S.G. §2A6.1(b)(1) and (b)(4) are clearly applicable here,
2 and U.S.S.G. §2A6.1(b)(6) is neither applicable nor warranted.

3 **I. FACTUAL BASIS FOR ADJUSTMENTS AT ISSUE**

4 The facts described below are derived from the Draft Presentence Report, ECF No.
5 53; Defendant's Objections to the Draft Presentence Report, ECF No. 58; the plea
6 agreement, ECF No. 47; and the government's discovery production in this case.
7 Defendant stipulated in the plea agreement that he sent the bomb threat at issue here to the
8 Arizona Secretary of State's Office on February 14, 2021, at approximately 9:52 p.m. local
9 Arizona time. Defendant also stipulated that he placed Public Official's first name into the
10 subject line of the message. Further, the record in this case shows that Defendant
11 conducted the following searches, at the approximate times listed below:
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- 15 ▪ February 14, 2021, at 9:47 pm local Arizona time: Defendant searched for
16 "Arizona secretary of state" and visited the Arizona Secretary of State
17 website at <https://azsos.gov>.
- 18 ▪ **February 14, 2021, at 9:48 pm and 9:51 pm local Arizona time:**
19 **Defendant visited the Contact Elections page of the Arizona Secretary**
20 **of State's web site at <https://azsos.gov/contact-elections>.**
- 21 ▪ February 14, 2021, at 9:52 pm local Arizona time: Defendant searched for
22 "[Public Official's Full Name] crazy."
- 23 ▪ February 14, 2021, at 9:52 pm local Arizona time: Defendant visited a
24 website at [https://www.kvoa.com/news/top-stories/2020/11/19/secretary-of-](https://www.kvoa.com/news/top-stories/2020/11/19/secretary-of-state-[Public%20Official's%20Full%20Name]-responds-to-threats-over-election-results/)
25 state-[Public Official's Full Name]-responds-to-threats-over-election-
26 results/.¹

27 ¹ The website for this November 19, 2020 article appears to have changed to:
28 [https://www.kvoa.com/news/politics/secretary-of-state-\[Public Official's full name\]-responds-to-](https://www.kvoa.com/news/politics/secretary-of-state-[Public%20Official's%20full%20name]-responds-to-threats-over-election-results/article_5767a07e-046d-5d71-aca6-c62b3d0c84ac.html)
threats-over-election-results/article_5767a07e-046d-5d71-aca6-c62b3d0c84ac.html.

- 1 ▪ February 14, 2021, at 9:52 pm local Arizona time: Defendant searched for
2 “[Public Official’s Full Name] address.”
- 3 ▪ February 14, 2021, at 9:53 pm local Arizona time: Defendant searched for
4 “[Public Official’s Full Name] how to kill.”
- 5 ▪ February 18, 2021, at 2:39 am local Arizona time: Defendant searched for
6 “fema boston marathon bombing.”
- 7 ▪ February 18, 2021, at 2:42 am local Arizona time: Defendant searched for
8 “fema boston marathon bombing plan digital army”

9 (Draft PSR ¶¶ 6, 7; ECF No. 47, at 7-8; Government Discovery Control No. 121.)

10 Defendant transmitted the charged bomb threat on Sunday, February 14, 2021.
11 Monday, February 15, 2021, was a federal holiday. Then, on February 16, 2021, shortly
12 after the 9 a.m. deadline for detonation of the threatened explosive device, staff members
13 at the Arizona Secretary of State’s Office read Defendant’s message, were fearful, and
14 immediately contacted law enforcement, which quickly responded to the situation. (Draft
15 PSR ¶¶ 7, 9.)

16 In response, law enforcement partially evacuated the Arizona Secretary of State’s
17 Office and the floor of the Arizona Governor’s Office, which is located in the same building
18 as the Arizona Secretary of State’s Office. (Draft PSR ¶¶ 7, 12.) Law enforcement ordered
19 the governor and other employees in the building to shelter in place. (*Id.* ¶ 12.) Meanwhile,
20 the Department of Public Safety (“DPS”) searched for an explosive device with its canines
21 on the floors of the Arizona Governor’s Office and the Arizona Secretary of State’s Office.
22 (*Id.*) Additionally, DPS conducted bomb sweeps of both the Public Official’s personal
23 residence and her vehicle. (*Id.*) The law enforcement responses to Defendant’s bomb
24 threat impacted official business at the government building.

1 **II. RESPONSE TO OBJECTION #1: DRAFT PSR, ¶ 19**

2 U.S.S.G. § 2A6.1(b)(1) is applicable based on the facts here. The standard of proof
3 applicable to this inquiry is preponderance of the evidence. Further, even under a clear and
4 convincing standard, the facts in this case clearly warrant the application of U.S.S.G.
5 § 2A6.1(b)(1). *First*, defendant’s conduct underlying this enhancement occurred
6 contemporaneously with the charged conduct. *Second*, the internet searches that defendant
7 conducted are on their face overt acts that evince intent to carry out Defendant’s threat.
8 *Third*, the enhancement applies regardless of defendant’s purported health condition or
9 likelihood that he in fact would detonate the threatened explosive device at the targeted
10 government office.

11 **A. Standard of Proof**

12 The government must meet a preponderance of the evidence standard here.
13
14 Generally, a preponderance of the evidence standard applies to factual findings that form
15 the basis for a sentencing enhancement. *United States v. Valle*, 940 F.3d 473, 479 (9th Cir.
16 2019). The government “must meet a higher standard—proof by ‘clear and convincing
17 evidence’—in cases where there is ‘an extremely disproportionate impact on the
18 sentence.’” *Id.* (quoting *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001)).

19 Courts in the Ninth Circuit “look to the totality of the circumstances to see if that
20 heightened standard applies.” *Valle*, 940 F.3d at 479 (citing *United States v. Pike*, 473 F.3d
21 1053, 1057 (9th Cir. 2007)). Such factors include:

- 22 (1) [W]hether “the enhanced sentence fall[s] within the
23 maximum sentence for the crime alleged in the indictment;”
24 (2) whether “the enhanced sentence negate[s] the presumption
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1 of innocence or the prosecution's burden of proof for the crime
2 alleged in the indictment;" (3) whether "the facts offered in
3 support of the enhancement create new offenses requiring
4 separate punishment;" (4) whether "the increase in sentence
5 [is] based on the extent of a conspiracy;" (5) whether "the
6 increase in the number of offense levels [is] less than or equal
7 to four;" and (6) whether "the length of the enhanced sentence
8 more than double[s] the length of the sentence authorized by
9 the initial sentencing guideline range in a case where the
10 defendant would otherwise have received a relatively short
11 sentence."

12 *United States v. Jordan*, 256 F.3d 922, 928 (9th Cir. 2001) (internal citations omitted)
13 (alterations in original).

14 Here, Defendant has not objected to the application of the victim-related adjustment
15 applicable under U.S.S.G. §3A1.2(a)(1) and (2). (Draft PSR ¶ 21.) The Guidelines for
16 Defendant are as follows:

	Undisputed	Disputed
Base Offense Level (USSG §2A6.1(a)(1))	+ 12	
Official Victim (USSG §3A1.2(a)(1), (2))	+ 6	
Evidence of Intent to Carry Out Threat (USSG §2A6.1(b)(1))		+ 6
Disruption of Government Functions (USSG §2A6.1(b)(4)(A))		+ 4
Total Offense Level	18	28

21 In light of the Guidelines calculations from the Draft PSR, and with the acceptance
22 of responsibility decrease, the total offense level for undisputed enhancements and
23 adjustments is 15. Therefore, Defendant's Guidelines range without the disputed
24 adjustments is 18-24 months. Defendant's Guidelines range with both enhancements that
25 Defendant has disputed in Defendant's Objections is 57-60 months. (Draft PSR ¶ 55.)

26 The government has made the required factual showing under either the
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1 preponderance of the evidence standard or the clear and convincing evidence standard. The
2 facts concerning both Defendant's internet activity and his searches underlying the
3 enhancement, as described above, are clear in the government's record evidence. That
4 Defendant conducted the internet searches and visited the websites described above is not
5 in dispute. Similarly, the facts underlying the results of Defendant's conduct—bomb
6 sweeps of multiple locations, the use of DPS canines, and the evacuation of multiple
7 government offices—are also not in dispute. (Draft PSR ¶¶ 7, 12; Obj. at 10.) The parties'
8 dispute centers on the conclusions that the Court should draw from the facts in the record.
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11 **B. The Enhancement is Appropriately Supported by Defendant's Conduct**
12 **Contemporaneous with and After Defendant's Transmission of the**
13 **Bomb Threat**

14 Defendant's conduct included: 1) searching for the relevant website for the
15 Secretary of State's Office, and then 2) visiting that site, 3) visiting another website
16 containing an article about the Public Official responding to threats over election results,
17 and also conducting additional searches with the Public Official's full name and the terms
18 4) "crazy," 5) "address," and 6) "how to kill," among other conduct as described above.
19 Defendant conducted the aforementioned internet searches all within a span of
20 approximately six minutes. As stated below, under the relevant caselaw, the government
21 submits that this conduct, particularly searching for the Public Official's name in
22 conjunction with terms such as "address" and "how to kill," warrants application of the
23 enhancement. This is so, regardless of whether the Court deems that such conduct occurred
24 immediately before, contemporaneously with, or immediately after sending the threat.
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28 Defendant first objects to the application of the adjustment on the basis that the

1 offense was completed at Defendant's "press[ing] the send button" on the threat, and that
2 two searches occurred after this fact. (Obj. at 1, 2.) But, as described above, conduct
3 evincing an intent to carry out the threat occurred within a course of conduct that spanned
4 approximately six minutes. The searches were contemporaneous to the offense conduct,
5 occurring within minutes of sending the threatening communication. Additionally,
6 Defendant conducted searches about a marathon bombing just four days after the date of
7 the charged threat; these searches relate to the promised harm of the charged threat, to wit,
8 the detonation of an explosive device.
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11 Contrary to Defendant's assertion, Obj. at 3, Application Note 1 to U.S.S.G. §2A6.1
12 does not preclude consideration of factors after the offense or otherwise limit the temporal
13 scope of the conduct that the court may consider when determining whether the
14 enhancement applies. (See Obj. at 3.) The history of Application Note 1 reflects that the
15 U.S. Sentencing Commission issued Application Note 1 to "address[] a circuit conflict
16 regarding the enhancement in §2A6.1 that provides a 6-level increase if the offense
17 involved any conduct evidencing an intent to carry out a threat," in particular, "whether or
18 not conduct which occurred prior to the making of the threat can evidence an intent to carry
19 out the threat." U.S. Sentencing Commission, Amendment 549 ("Reason for
20 Amendment"), <https://www.ussc.gov/guidelines/amendment/549> (citations omitted).
21 Application Note 1 was not intended to preclude post-offense conduct from consideration,
22 but rather was meant to clarify in light of the circuit split that "conduct which occurred
23 prior to the offense" should be considered only where "the prior conduct is substantially
24 and directly connected to the offense." *Id.*
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1 Courts have routinely considered a defendant's conduct *after* a charged offense in
2 determining whether the enhancement at issue applies. In *United States v. Smith*, a Ninth
3 Circuit panel found that the district court did not clearly err in imposing a six-level
4 enhancement for an intent to carry out threats where the defendant and his friends arrived
5 at the victim's house after the defendant had made the threats. 365 F. App'x 781, 788 (9th
6 Cir. 2010). Further, in *United States v. Dugan*, a Ninth Circuit panel found that the district
7 court did not clearly err in finding that the defendant in that case engaged in conduct
8 evidencing an intent to carry out a threat where the defendant had stipulated to the fact that,
9 after the threat, he obtained an assault rifle and ammunition. 232 F. App'x 698, 699 (9th
10 Cir. 2007); *see also United States v. Hines*, 26 F.3d 1469, 1474 (9th Cir. 1994)
11 ("[Defendant's] subsequent actions were sufficient to justify the enhancement"); *United*
12 *States v. Wagoner*, 564 F. App'x 780, 783 (6th Cir. 2014) (affirming district court's finding
13 that defendant's arrival at victim public office after transmitting a threatening
14 communication warranted an offense level increase for conduct evidencing an intent to
15 carry out the threat); *United States v. Bellrichard*, 62 F.3d 1046, 1051 (8th Cir. 1995)
16 (affirming district court's finding that enhancement applied after considering defendant's
17 statements after the charged conduct); *United States v. Green*, 25 F.3d 206, 207 (3d Cir.
18 1994) (affirming district court's application of enhancement where defendant attempted to
19 obtain threat victim's address *three days* after charged threat) (emphasis added).

20 In fact, categorically excluding from consideration any evidence of intent to carry
21 out a threat after the charged threat would lead to absurd results. *United States v. Thomas*,
22 155 F.3d 833, 839 & n.2 (7th Cir. 1998) ("[T]o illustrate the point more dramatically,

1 consider a scenario in which a defendant, several months after sending a threat, shoots out
2 the windows of his victim's car and truck, narrowly missing the victim's child. . . . [I]t is
3 undoubtedly probative of whether the defendant intended to carry through with his
4 threat."").

6 **C. Internet Searches Constitute Overt Acts Sufficient for the Application**
7 **of U.S.S.G. §2A6.1, and the Searches Here Warrant This Enhancement**

8 Defendant's argument that internet searches without more are insufficient for the
9 application of the enhancement, Obj. at 3, is also unavailing. Defendant's conducting of
10 internet searches for further information about how to carry out the bomb threat that he
11 transmitted, and for further information about the victim's whereabouts, constitute overt
12 acts that warrant application of the enhancement here. A Ninth Circuit panel considered a
13 similar situation in *United States v. Spangle*, in which the panel affirmed the district court's
14 finding that the enhancement applied where certain lists were found in the defendant's
15 prison cell after he had sent a threatening letter to a probation officer. *United States v.*
16 *Spangle*, 281 F. App'x 693, 694 (9th Cir. 2008). The materials included, in part, lists with
17 the probation officer's name and work address, of locations where a firearm can be
18 concealed on one's body, and various methods of locating people, such as use of phone
19 books and school records. *See* Brief for the United States, *United States v. Spangle*, No.
20 04-50311, 2005 WL 1153572, at *7–8 (Mar. 28, 2005). Further, in *United States v. Green*,
21 the Third Circuit affirmed the district court's application of the enhancement at issue,
22 concurring that the defendant's attempt to obtain the victim's address by asking a friend to
23 run victim's license plate constituted an overt act sufficient for the enhancement. 25 F.3d
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1 206, 207 (3d Cir. 1994). Defendant’s internet searches are analogous to the overt acts in
2 these cases, and application of the enhancement here is warranted.

3 **D. The Enhancement Applies Regardless of Defendant’s Purported Health**
4 **Condition or Likelihood of Carrying Out the Threat**

5 Defendant also argues that the enhancement should not apply because he was not
6 “likely” to carry out the bomb threat or capable of doing so. (Obj. at 4-6.) Section
7 2A6.1(b)(1) provides for a six-level enhancement if “the offense involved any conduct
8 evidencing an intent to carry out” the threat for which the defendant was convicted. The
9 adjustment’s applicability “does not depend on the defendant’s actual intent, which could
10 exist regardless of whether any actions were taken toward carrying it out; rather it depends
11 on whether or not the defendant engaged in conduct from which the court permissibly
12 infers such an intent.” *United States v. Berndt*, 127 F.3d 251, 259 (2d Cir. 1997).
13 Defendant’s admonition to “distinguish between the risky threats from the riskless threats,”
14 Obj. at 5, carry no weight when the recipients of the threat, and the law enforcement
15 agencies responding to the threat, have no indication at the time that Defendant was or was
16 not intending to do what he threatened—to detonate an explosive device. If a threat is
17 perceived as a serious threat to life and safety, as both the victims and responding law
18 enforcement perceived Defendant’s threat here, then the threat is not “riskless.” And while
19 Defendant argues that his physical limitations prevented his carrying out the threat, Obj. at
20 6, the relevant inquiry here “is not whether [the defendant] was physically able to carry out
21 his threats against [the victim], but whether his undisputed conduct demonstrated his intent
22 to do so.” *United States v. Nickerson*, 782 F. App’x 377, 380 (6th Cir. 2019).
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1 The record shows that Defendant accessed an article about the victim, searched for
2 “how to kill” the victim, and searched for the address of the victim at the same time as he
3 transmitted a bomb threat to the victim’s office. The record also shows that, four days after
4 transmitting the threat, Defendant searched for information about the Boston Marathon
5 bombing. These searches clearly evince intent to carry out the threat for which Defendant
6 was convicted.
7

8 **III. RESPONSE TO OBJECTION #2: DRAFT PSR, ¶ 20**
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10 The Draft Presentence Report appropriately applied four offense levels because
11 Defendant’s threat here caused substantial disruption of public, governmental functions
12 and services. (Draft PSR, ¶ 20 (citing U.S.S.G. §2A6.1(b)(4)(A).) The term “substantial
13 disruption” of government and public functions and services “suggests a significant
14 interruption of normal activities when measured by scope and time.” *United States v.*
15 *Anwar*, 741 F.3d 1134, 1137 (10th Cir. 2013) (citation omitted). As Defendant notes, Obj.
16 at 11, in *United States v. Dudley* the Eleventh Circuit affirmed the district court’s finding
17 that the “substantial disruption” enhancement applied there. The facts in the *Dudley* case
18 are similar to those presented here: The defendant had mailed an envelope containing white
19 powder to a judge, and this threat letter caused half of a state courthouse floor to close for
20 two hours, two people to be quarantined, and interruptions to the court proceedings of two
21 judges for several hours, as well as the recipient judge being required to spend “many
22 hours” discussing the case with law enforcement. *United States v. Dudley*, 463 F.3d 1221,
23 1224–26 (11th Cir. 2006).
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28 At bottom, Defendant argues that the U.S.S.G. §2A6.1(b)(4)(A) enhancement is

1 inapplicable because his bomb threat was not sufficiently disruptive. The record shows
2 that, in response to Defendant's threat, law enforcement evacuated parts of the Arizona
3 Secretary of State's Office and the floor of the Arizona Governor, and that law enforcement
4 ordered the Arizona Governor and other employees in the building to shelter in place. (PSR
5 ¶ 7.) The record also shows that DPS searched for an explosive device with its canines on
6 the floors of the Arizona Governor and the Arizona Secretary of State's Office and that it
7 conducted bomb sweeps of both Public Official's personal residence and her vehicle. (PSR
8 ¶¶ 7, 12; Plea Agreement at 8.) Clearly, Defendant's bomb threat substantially disrupted
9 state government and public functions. The application of the enhancement is warranted
10 on the facts presented here.

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14 **IV. RESPONSE TO OBJECTION #3: USSG §2A6.1(b)(6), REDUCTION ONLY**
15 **IF SUBDIVISIONS (b)(1)-(4) DO NOT APPLY**

16 Pursuant to USSG §2A6.1(b)(6), a 4-level reduction applies where the threat
17 involved "a single instance evidencing little or no deliberation," but only in instances where
18 none of the other enhancements at U.S.S.G. §2A6.1(b)(1)-(4) apply. Here, as described
19 above, the enhancements for §2A6.1(b)(1) and §2A6.1(b)(4) both apply, and therefore,
20 defendant is not entitled to such a 4-level reduction, even if his actions were seen as
21 otherwise qualifying. While the threat sent was a single threat, the multiple actions of
22 defendant detailed above, to wit, visiting different websites and conducting multiple
23 searches, indicate more than the "little or no deliberation" required for this adjustment.
24 What is more, Defendant's actions resulting in a canine search, bomb sweeps, evacuation
25 of multiple governmental offices, and public employees sheltering in place, certainly
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1 caused the substantial disruption warranting the application of U.S.S.G. §2A6.1(b)(4).
2 Applying either of the enhancements at (b)(1) or (b)(4), makes the 4-level reduction of
3 §2A6.1(b)(6) inapplicable, and here, both enhancements apply.
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5 For the above reasons, the government requests that the Court deny Defendant's
6 objections to the Draft Presentence Report.

7 Respectfully submitted this 26th day of February, 2024.
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